(37673)

Supreme Court of the United States

OCTOBER TERM, 1964

No. 468

Office Supreme Court, U.S.
FILED
SEP 8 1964
JOHN F. DAVIS, CLERK

In the Matter of the Petition of

THE CITY OF NEW YORK,

Petitioner,

As owner of the Ferryboat TOMPKINSVILLE for a limitation of or exoneration from liability,

ROSE BERNSTEIN, FRANK BORREL, JOHN BURKE, PHILIP A. CASCIOLA, JOHN ELZER, JOSEPH FINNEY, SOPHIA FINNEY, ANTHONY FRIJIA, JOSEPH GANNON, BRENDA KINSLEY HAMILTON, WILLIAM H. JUNG, WILMA PINCUS KAIL, MARGARET MARSIGLIA, NICHOLAS MARSIGLIA, ALMINA NAGEL, as limited Administratrix of the Estate of ALLEN FRANCIS EDGAR, Deceased, MARGARET V. NALLY, CHRISTOPHER NALLY, ROBERT PIPER, TEXACO INC., and MYRON VARNUM,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LEO A. LARKIN,
Corporation Counsel of the City of New York,
Proctor for Petitioner,
Municipal Building,
New York, New York 10007

SEYMOUR B. QUEL,
JOEL L. COHEN,
of Counsel.

INDEX

	PAGE
Opinion Below	2
Jurisdiction	2
Question Presented	2
Statement	2
Reasons for Granting the Writ	5
Conclusion	7
Appendix A—Opinion Below	9
Appendix B—Final Decree on Mandate and Remand	15

CITATIONS

CASES:

Burrows v. *Lownsdale*, 133 F. 250 (9th Cir., 1904)	5
Moore-McCormack Lines, Inc. v. *Amirault*, 202 F. 2d 893 (1st Cir., 1953)	6
Moore-McCormack Lines, Inc. v. *Richardson*, 295 F. 2d 583 (2d Cir., 1961), *cert. denied*, 368 U. S. 989 (1962)	4, 6
National Airlines, Inc. v. *Stiles*, 268 F. 2d 400 (5th Cir., 1959), *cert. denied*, 361 U. S. 885 (1959)	6

PAGE

The Argo, 210 F. 872 (9th Cir., 1914) 5
The Manhattan, 85 F. 2d 427 (3rd Cir., 1936), *cert. denied*, sub nom. *United States* v. *The Bessemer*, 300 U. S. 654 (1937) 6
The President Madison, 91 F. 2d 835 (9th Cir., 1937) 6
The Wright, 109 F. 2d 835 (2d Cir., 1940) 6

Union Steamboat Co. v. *Chaffin Adm'rs*, 204 F. 412 (7th Cir., 1913) 5
Union Steamboat Co. v. *Fitzgibbons*, 261 F. 768 (6th Cir., 1919) 5

STATUTES:

Death on the High Seas Act, 41 Stat. 537 (1920), 46 U. S. C. § 761 6

MISCELLANEOUS:

McCormack, Damages §§ 50-57 (1935) 5

Supreme Court of the United States

OCTOBER TERM, 1964

No. .....

In the Matter of the Petition of

THE CITY OF NEW YORK,

Petitioner,

As owner of the Ferryboat TOMPKINSVILLE for a limitation of or exoneration from liability,

ROSE BERNSTEIN, FRANK BORREL, JOHN BURKE, PHILIP A. CASCIOLA, JOHN ELZER, JOSEPH FINNEY, SOPHIA FINNEY, ANTHONY FRIJIA, JOSEPH GANNON, BRENDA KINSLEY HAMILTON, WILLIAM H. JUNG, WILMA PINCUS KAIL, MARGARET MARSIGLIA, NICHOLAS MARSIGLIA, ALMINA NAGEL, as limited Administratrix of the Estate of ALLEN FRANCIS EDGAR, Deceased, MARGARET V. NALLY, CHRISTOPHER NALLY, ROBERT PIPER, TEXACO INC., and MYRON VARNUM,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled proceeding on June 10, 1964, insofar as such judgment affirmed that portion of a Final Decree of the United States District Court for the Southern District of New York, entered September 21, 1963, which adjudged and decreed that interest be allowed at the rate of 6% from January 5, 1959, the date of the collision, to all claimants on the amount of their recoveries against the petitioner.

Opinion Below

The opinion of the Court of Appeals is reported in 332-F. 2d 1006, and is annexed hereto as Appendix A, *infra*, pp. 9-14.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on June 10, 1964 (R. Vol. II, p. 20a). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

Question Presented

Whether an Admiralty Court has power to allow pre-judgment interest on a personal injury claim.

Statement of the Case

This proceeding arose out of the collision on the night of January 5, 1959, in Upper New York Bay between the oil barge *Texaco 396*—earlier in tow of the tug *All American* but at the time adrift by reason of the parting of its hawser —and the ferryboat *Tompkinsville*, en route from the Battery to St. George, Staten Island, on one of its regular trips. The collision resulted in damage to both vessels and in personal injuries to a number of passengers on the ferryboat.

Thereafter, Texaco, Inc., owner and operator of the barge and tug, and The City of New York, owner and operator of the ferryboat, filed separate petitions in the United States District Court for the Southern District of New York seeking limitation of or exoneration from liability for any loss suffered by others occasioned by the collision.

These petitions were the subject of a consolidated hearing on the merits, in which counsel for the personal injury claimants took part, seeking recovery for the injured against either or both of the petitioners.

On June 21, 1961, the trial judge filed an opinion containing detailed findings of fact. 210 F. Supp. 390. He found that the ferryboat TOMPKINSVILLE was solely responsible for the collision and that the City of New York was neither entitled to exoneration nor to a limitation of its liability and sustained the claims of the injured passengers and of Texaco, Inc. against the City. The trial judge further found that Texaco, Inc. was entitled to exoneration and dismissed all claims against Texaco, Inc.

Pursuant to his opinion an interlocutory decree was filed against the City of New York upon its petition and a final decree in favor of Texaco, Inc. upon its petition (R. Vol. II, p. 1a).

The City of New York appealed from both decrees, and the personal injury claimants appealed from the final decree exonerating Texaco, Inc. The United States Court of Appeals for the Second Circuit affirmed both decrees in a *per curiam* opinion reported 309 F. 2d 739 (1962).

The proceeding was then referred to a Special Commissioner for the taking of proof of the claimants' damages and to report the same to the District Court. The Special Commissioner filed his report with the District Court on or about July 18, 1963, and exceptions to such report were filed by the City of New York, petitioner, and by the claimants Texaco, Inc. and William H. Jung (R. Vol. II, p. 2a).

On September 21, 1963, the District Court entered a decree which, among other things, decreed that the claimants be allowed interest on the damages awarded from the date of the collision, January 5, 1959 (R. Vol. I, p. 3a).

Petitioner appealed from certain portions of the Final Decree and contended, among other things, that an admiralty court lacks the power to award prejudgment interest in a personal injury claim. This contention was rejected by the Court of Appeals.

The Court of Appeals in rejecting petitioner's contention placed great reliance upon its opinion in *Moore-McCormack Lines, Inc.* v. *Richardson*, 295 F. 2d 583 (1961), *cert. denied*, 368 U. S. 989 (1962), but deemed it advisable to state that traditionally at common law prejudgment interest has not been allowed on a unliquidated tort claim.

The Court of Appeals affirmed the decree in part, modified it in part and remanded the proceeding to the District Court to determine the proper portion of the damages awarded on which prejudgment interest is to be paid (Appendix A, p. 14).

On August 5, 1964, pursuant to the mandate and remand of the Court of Appeals, a hearing was held in the District Court to determine whether the awards allowed by the Special Commissioner reflect any item for the alleged delay in assessing damages. It was further to be determined at the hearing on the remand whether any of awards allowed represent any item of compensation for future loss of earnings or for future pain and suffering. The Court of Appeals had held that as to these items prejudgment interest was not allowable (Appendix A, p. 13).

On August 17, 1964, pursuant to the mandate of the Court of Appeals and the hearing on the remand, the District Court modified the Final Decree and decreed, among other things, that if the City of New York files a petition for a writ of certiorari execution on the amounts awarded the personal injury claimants shall be stayed. (Final Decree on Mandate and Remand is annexed hereto as Appendix B, *infra*. pp. 15-25).

Reasons for Granting the Writ

1. The decision of the court below in the instant case is directly in conflict with the decisions of (1) the Court of Appeals for the 9th Circuit in *Burrows* v. *Lowensdale*, 133 F. 250 (1904) and *The Argo*, 210 F. 872 (1914), (2) the Court of Appeals for the 7th Circuit in *Union Steamboat Co.* v. *Chaffin Adm'rs*, 204 F. 412 (1913) and (3) the Court of Appeals for the 6th Circuit in *Union Steamboat Co.* v. *Fitzgibbons*, 261 F. 768 (1919). In each of those four cases the Court of Appeals for the various Circuits involved held that an admiralty court was without power to award prejudgment interest in a personal injury claim. In addition, the Court of Appeals for the 1st Circuit in *Moore-McCormack Lines* v. *Amiranlt*, 202 F. 2d 893, 897-898 (1953), in a well considered *dictum*, stated, per Magruder, *J.*, that while federal courts sitting admiralty have been more flexible in allowing prejudgment interest on some unliquidated claims it is at least doubtful whether an admiralty court has the discretion to allow interest on the usual tort claim for personal injuries from a date prior to the entry of the final decree.

2. Clearly, the question presented is of importance in the field of admiralty law. Settlement of the question by this Court is plainly in the public interest since it will be presented in a multitude of admiralty proceedings, including many now pending in the courts. The availability of prejudgment interest in a personal injury claim has been little litigated and has never been passed upon by this Court.[1]

3. The decision of the court below is believed to be erroneous and in direct conflict with existing admiralty law.

---

[1] See generally McCormack, Damages §§ 50-57 (1935).

While admiralty has been more willing to allow prejudgment interest than the law courts[2] in actions for property damage[3] we are aware of no precedent, nor logical rationale, for allowing such interest on a claim for personal injury.

The Court of Appeals placed great reliance upon and analogized the instant case to its holding in *Moore-McCormack Lines, Inc.* v. *Richardson*, 295 F. 2d 583 (2d Cir., 1961), *cert. denied*, 368 U. S. 989 (1962) in which the Court allowed interest from the date of death until the date of judgment on the sums awarded claimants under the Death on the High Seas Act.[4] With deference to the Court of Appeals a Death on the High Seas action is clearly distinguishable from one for personal injuries.

Actions involving claims for property damage or for wrongful death[5] are analogous since in both the entire loss occurs at one time and may be measured as of that time. However, in a personal injury claim the defendant cannot be expected to settle his liability before judgment, for there are ordinarily no reasonable guidelines by which the parties can predict what the subsequent award might turn out to be. In a personal injury action, pain and suffering and medical expenses incurred long after the wrongful act may augment the defendant's liability. Should a claimant be allowed interest on such amounts from the date of the wrongful act? The addition of interest on such amounts would clearly give the claimant more than just com-

---

[2] MOORE-MCCORMACK LINES, INC. v. AMIRAULT, 202 F. 2d 893, 898 (1st Cir., 1953) (dictum).

[3] See, *e.g.*, THE MANHATTAN, 85 F. 2d 427 (3rd Cir., 1936), *cert. denied*, sub nom. UNITED STATES v. THE BESSEMER, 300 U. S. 654 (1937); THE PRESIDENT MADISON, 91 F. 2d 835 (9th Cir., 1937); THE WRIGHT, 109 F. 2d 835 (2d Cir., 1940).

[4] 41 Stat. 537 (1920), 46 U. S. C. § 761 (1958) (wrongful death).

[5] See NATIONAL AIRLINES, INC. v. STILES, 268 F. 2d 400 (5th Cir., 1959), *cert. denied*, 361 U. S. 885 (1959).

pensation. When an element of damages, such as pain and suffering in a personal injury, is in one lump sum, the denial of prejudgment interest would seem to be mandated because of the uncertainty as to the measure of such damages.

The personal injury claimant in admiralty should not be entitled to any greater rights than an injured party in a civil action on the law side of the federal courts. Neither one is, nor should be, entitled to prejudgment interest and the Courts below were without power to allow such interest.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be granted.

September 3, 1964

Respectfully submitted,

LEO A. LARKIN,
Corporation Counsel of the City of New York,
Proctor for Petitioner.

SEYMOUR B. QUEL,
JOEL L. COHEN,
of Counsel.

APPENDIX A

Opinion of United States Court of Appeals for the Second Circuit

LUMBARD, *Chief Judge*:

This appeal by the City of New York from a final decree and a supplemental decree of the United States District Court for the Southern District of New York in an admiralty proceeding raises two principal questions: (1) whether it was proper to award prejudgment interest to the personal injury claimants; and (2) whether the granting of a $10,000 fee to the Special Commissioner, appointed by the court to determine damages, was excessive.

These decrees are the most recent developments in a series of proceedings arising out of the collision on the night of January 5, 1959 in upper New York Bay between the oil barge, Texaco 396, and the ferryboat, Tompkinsville, owned and operated by the City of New York. The district court had ruled that it was solely the petitioner, the City of New York, who was responsible for the collision and therefore the City was entitled neither to exoneration nor to a limitation of its liability, that the claims of the injured passengers on the Tompkinsville and of Texaco, Inc. against the City should be sustained and that the claims of the passengers against Texaco, Inc. should be dismissed. 210 F. Supp. 390 (S. D. N. Y. 1961), aff'd 309 F. 2d 739 (2 Cir. 1962). Thereafter the various claimants submitted evidence showing the extent of their injuries to the Special Commissioner whose report fixing damages, after some modification, was confirmed by the district court. Judge Palmieri, in his final decree, dated September 21, 1963, allowed 6% interest on the damages awarded from the date of the collision, January 5, 1959, and

ordered that the Special Commissioner be paid the sum of $10,000 by the petitioner for his services. In a supplemental decree on October 8, 1963, the court ordered that the personal injury claimants recover from the petitioner, in addition to the amounts of their recoveries recited in the final decree, costs awarded against such claimants upon the dismissal of their claims against Texaco, Inc. in the companion suit.

The City of New York contends that the interest rate of 6% was an abuse of the district court's discretion, that the award of $10,000 to the Commissioner was excessive, that an admiralty court has not the power to award to the personal injury claimants the costs awarded against them in the companion limitations suit of Texaco, and, that an admiralty court lacks the power to allow prejudgment interest in a personal injury claim. We find merit only in the contention that the award to the Commissioner was excessive.

Of the 18 claimants only Texaco's claim was based on a property loss rather than personal injury. The City of New York asserts that an admiralty court has no power to allow prejudgment interest in a personal injury claim. We disagree. It has long been held proper for admiralty courts fully to restore the injured party to his condition at the time of injury by allowing and fixing prejudgment interest from the date of the loss in proceedings involving property damage.[1] *The Manhattan*, 85 F. 2d 427 (3 Cir. 1936), cert. denied, sub nom. *United States* v. *The Bessemer*, 300 U. S. 654 (1936); *The President Madison*, 91

[1] This doctrine in admiralty is frequently referred to as *restitutio in integrum*. See *The Baltimore*, 75 U. S. 377 (1869).

F. 2d 835 (9 Cir. 1937); *The Wright*, 109 F. 2d 699 (2 Cir. 1940); *Geotechnical Corp. of Delaware* v. *Pure Oil Co.*, 214 F. 2d 476 (5 Cir. 1954). Traditionally, at common law prejudgment interest on an unliquidated tort claim is not allowed. See *Moore-McCormack Lines* v. *Amirault*, 202 F. 2d 893 (1 Cir. 1953). More recently, it has been determined that those who obtain awards resulting from deaths of crew members who died in maritime accident are entitled to prejudgment interest. *National Airlines, Inc.* v. *Stiles*, 268 F. 2d 400 (5 Cir. 1959); *Moore-McCormack Lines, Inc.* v. *Richardson*, 295 F. 2d 583 (2 Cir. 1961), cert. denied, 368 U. S. 989 (1962). We said in the *Moore-McCormack* case that "when a court fixes damages to compensate for a loss which occurred in the past, there should be some allowance for the period between the date of the loss and the date of judgment. Recompense may thus be given for the further loss in the postponement of the receipt of compensation. In all too many instances the delay in reaching cases for trial brings suffering and privation to those who were dependent on the deceased. Even the more fortunate of the bereaved may have been forced to borrow money at interest to meet their expenses . . . [T]he defendants who are ultimately directed to pay have had the use of the money declared to be due . . ." *Supra* at 594. It is the combination of these two elements, the immediate loss to the plaintiff and the delay in the payment of compensation by the defendant that warrants the granting of prejudgment interest as a proper element of damages in fixing the loss to the dependents of decedents who bring suit in a court of admiralty.

Appendix A

Opinion of United States Court of Appeals for the Second Circuit

In this case 17 claimants suffered physical injury. Elements of these claims included the cost of medical care, X-rays, medication, and pain and suffering, as well as the pecuniary loss attributable to absence from employment. We see little reason for distinguishing between the loss resulting from medical expenses, pain and suffering, and diminution of earning power in the action involving a wrongful death and the case where, as here, the plaintiffs' injuries though not fatal nonetheless warrant the awarding of damages. In both the *Moore-McCormack* v. *Richardson* case and in the instant case the plaintiffs suffered a loss at a time long prior to the determination of the dollar measure of the loss. The defendant's liability arises at the time of the injury to the plaintiff and the later award by the court merely fixes the amount of a loss suffered at a prior time.

The broad application of *restitutio in integrum* enables a more equitable measure of the loss to the injured party—particularly in light of the progressively long delays in disposing of much of the litigation which must wait its turn on crowded court calendars. Moreover, the award of prejudgment interest discourages sham contentions and an improper use of the law's delays and thereby assists an earlier settlement between the parties.

Certainly the granting of prejudgment interest is not appropriate when the determination of damages itself includes some compensation for the delay from the time of injury to the time of judgment. All the claimants presented evidence before the Commissioner who determined the damages to each. These awards varied between $150 and $18,000. Yet nowhere in the report of the Commissioner is

there any indication whether the damages allowed reflect the delay in assessing damages. In addition the report of the Commissioner does not reveal whether any of the damages allowed here represent compensation for future loss of earnings or future pain and suffering. To the extent that there are elements of future losses which are represented in the final damages prejudgment interest is, of course, not appropriate. We therefore remand the case to the district court to determine consistent with this opinion what is the proper portion of the damages awarded for each claim on which the prejudgment interest should run.

We find merit in the City of New York's claim that the payment of $10,000 to the Commissioner as his fee for services was grossly excessive. The Commissioner and his associates devoted 161 hours to the case, which included six days of hearings in which testimony and exhibits were submitted by the plaintiffs to establish their damages. The Commissioner's report ruled on four objections which were simple in nature and which he disposed of in a few paragraphs. The question of negligence was not before the Commissioner; his sole responsibility was the fixing of damages. The Commissioner's report merely lists the names of the claimants, the amounts they claimed and the amounts he recommended be allowed; nothing was said of the nature of the injuries, the proof or the reasons for the amounts allowed. The amounts allowed totalled $46,454.60, excluding interest and costs. For his report the Commissioner requested a fee of $12,000 which the district court reduced to $10,000. Considering the nature of the questions to be determined, the amounts involved and the inade-

quacy and summary nature of the report, we find an allowance of $3,500 quite sufficient and we direct reduction of the allowance to that amount.

Pursuant to the memorandum of Judge Palmieri, which was endorsed and attached to the final decree, the personal injury claimants were allowed as additional costs the costs awarded against them in the companion limitations suit of Texaco. It is the City's contention that the court below was without power to make this award. It is unquestioned that the admiralty court, subject to such limitations as may have been imposed by statute, has a sound discretion as to the matter of costs, and costs may be allowed or denied on equitable considerations. The court below awarded these additional costs as part of the claimants' "necessary expenses." These claimants, innocent of any fault, were in many instances recipients of small awards which would only be diminished to perhaps unjust proportions had the costs of Texaco also been allowed to fall on them. We cannot say that the district court's discretion in allowing costs to the claimants was unreasonably exercised.

Finally, the district court's allowance of interest at the rate of 6% cannot be deemed so high as to exceed the permissible limits of the trial court's discretion. While we might not have awarded interest at the full legal rate, it was within the power of the lower court to have done so.

Affirmed in part; modified in part; and remanded to determine the proper portion of the damages awarded on which prejudgment interest is to be paid.

APPENDIX B

Final Decree on Mandate and Remand

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

198 Ad. 226

In the Matter of the Petition of The City of New York, as owner of the Ferryboat TOMPKINSVILLE, for Limitation of or Exoneration from Liability.

An interlocutory decree, after a trial on the merits and a decision by this Court, holding the petitioner herein solely at fault without limitation for the collision hereinafter mentioned, having been duly entered on September 6, 1961, in which it was ordered, adjudged and decreed that all claimants who had filed claims recover with interest and costs from the petitioner The City of New York the damages sustained by them as a result of the collision between the petitioner's ferryboat TOMPKINSVILLE and the barge TEXACO 396, in tow of the tug ALL AMERICAN, on January 5, 1959, referring the matter to Joseph E. Ruggiero, Esq., as Special Commissioner to take proof of claimants' damages and report to this Court; and

The petitioner herein, by notice dated September 14, 1961, having appealed from said decree, and upon the appeal the United States Court of Appeals for the Second Circuit, after argument and due deliberation, having affirmed said interlocutory decree and decision of this Court dated June 29, 1961, upon which the decree was based, and thereafter an

interlocutory decree on mandate having been entered by this Court on December 21, 1962, wherein, among other things, it was ordered, adjudged and decreed that the judgment of the United States Court of Appeals be made the judgment of the district court, that the aforesaid decree of the district court entered on September 6, 1961, be affirmed in all respects, and that the Special Commissioner appointed by the interlocutory decree of September 6, 1961, proceed to take proof of the damages of the claimants and report to this court; and the Special Commissioner having heard the evidence and taken proof of the damages of the claimants, and having also heard the petitioner's evidence in opposition thereto, and having ascertained the various amounts of claimants' damage and set them forth in his written report filed herein on July 18, 1963, together with his suggestion with respect to his fees for services rendered; and the petitioner The City of New York and the claimants William H. Jung and Texaco Inc. having filed exceptions to the Commissioner's report aforesaid, and no other persons having filed exceptions thereto, and the court thereafter having held a hearing on the aforesaid exceptions at which the Special Commissioner was present and, after due deliberation, having increased the amounts awarded to the claimant William H. Jung and the claimant Texaco Inc., and having affirmed the report of the Special Commissioner in all other respects; and

A final decree having been entered herein on September 20, 1963 which, among other things, ordered, adjudged and decreed that the Special Commissioner's report, as modified with respect to the awards of the claimants Jung and Texaco be confirmed and made the judgment of the court, and

the claimants in this proceeding recover from the petitioner of The City of New York, and The City of New York pay, their damages with interest at 6% from January 5, 1959, and costs, all as set forth in said final decree, and ordered, adjudged and decreed that the Special Commissioner Joseph E. Ruggiero be paid by The City of New York his fee for services and disbursements herein; and

A supplemental decree having been entered herein on October 8, 1963, ordering, adjudging and decreeing that The City of New York pay the costs of the claimant Texaco Inc., as petitioner in a companion limitation proceeding, initially awarded against the several personal injury claimants herein; and

The petitioner, The City of New York having appealed from so much of the final decree entered on the 21st day of September 1963 as ordered, adjudged and decreed the award of interest at 6% from January 5, 1959 to all the claimants on the amounts of their damages recovered against the petitioner The City of New York, and awarded the Special Commissioner, Joseph E. Ruggiero $10,000.00 for his services; and the petitioner The City of New York having also appealed from the supplemental decree entered on October 8, 1963; and on appeal the United States Court of Appeals for the Second Circuit, after argument and due deliberation, having affirmed the aforesaid final decree entered on September 21, 1963, insofar as that decree ordered, adjudged and decreed that interest be allowed at 6% from January 5, 1959, except insofar as such pre-judgment interest was allowed on prospective damages awarded to the personal injury claimants by the Special Commissioner, and the said Court of Appeals having further modified the decree to

award the Special Commissioner $3,500.00 for his services, and the Court of Appeals having further remanded the case to the District Court for determination of the amounts awarded by the Special Commissioner for prospective damages, as to which no prejudgment interest should be allowed, and said Court of Appeals having affirmed in its entirety the supplemental decree entered on October 8, 1963; and

The Court of Appeals having handed down its mandate and pursuant to the mandate and remand of the Court of Appeals and the decision of the Court of Appeals dated June 10, 1964, a hearing having been held before the Honorable Edmund L. Palmieri on the 5th day of August 1964, at which hearing the Special Commissioner attended and advised that he had awarded prospective damages to the claimant William H. Jung in the amount of $1,000.00 and prospective damages to the claimant Myron Varnum in the amount of $2,500.00, and had awarded no other claimant prospective damages, and the court having confirmed the Special Commissioner's decision, and the appropriate reduction in interest having been made;

Now, on motion of Brush & Brush, proctors for the claimant Texaco Inc., it is

ORDERED, ADJUDGED AND DECREED, that the decision and mandate of the United States Court of Appeals for the Second Circuit, entered with the clerk of this Court on July 6, 1964, be and the same hereby is made the judgment of this Court; and it is

ORDERED, ADJUDGED, AND DECREED that the final decree of this Court entered on September 21, 1963 be and the same

hereby is modified to award the claimant William H. Jung interest at 6% from January 5, 1959 to September 21, 1962 only on $4,000.00 of his damages, to award the claimant Myron Varnum interest at 6% from January 5, 1959 to September 21, 1963 only on $15,500.00 of his damages, and to order payment to Joseph E. Ruggiero of a sum of $3,500.00 for his services, and except as modified, said final decree is in all respects affirmed; and it is

ORDERED, ADJUDGED and DECREED, that in accordance with the aforesaid interlocutory decree on mandate, final decree, and supplemental decree, the claimants named below have and recover from the petitioner of The City of New York, and The City of New York is directed to pay, the following amounts, all with interest from the date of the aforementioned final decree:

ROSE BERNSTEIN	Damages	5,500.00
	Prejudgment Interest	1,554.30
	Costs	182.63
	Total	7,236.93
FRANK BORREL	Damages	700.00
	Prejudgment Interest	169.56
	Costs	29.50
	Total	899.06
JOHN BURKE	Damages	450.00
	Prejudgment Interest	127.17
	Costs	20.00
	Total	597.17

Appendix B

Final Decree on Mandate and Remand

LIP A. CASCIOLA	Damages	2,000.00
	Prejudgment Interest	565.20
	Costs	29.50
	Total	2,594.70
N ELZER	Damages	500.00
	Prejudgment Interest	141.30
	Costs	27.50
	Total	668.80
EPH FINNEY	Damages	300.00
	Prejudgment Interest	84.78
	Costs	29.50
	Total	414.28
HIA FINNEY	Damages	150.00
	Prejudgment Interest	42.39
	Costs	27.50
	Total	219.89
THONY FRIJIA	Damages	400.00
	Prejudgment Interest	113.04
	Costs	29.50
	Total	542.54

Appendix B

Final Decree on Mandate and Remand

JOSEPH GANNON	Damages	850.00
	Prejudgment Interest	240.21
	Costs	30.00
	Total	1,120.21
BRENDA KINSLEY HAMILTON	Damages	350.00
	Prejudgment Interest	98.91
	Costs	29.50
	Total	478.41
WILLIAM H. JUNG	Damages	5,000.00
	Prejudgment Interest	1,130.40
	Costs	29.50
	Total	6,159.90
WILMA PINCUS KAIL	Damages	350.00
	Prejudgment Interest	98.91
	Costs	27.50
	Total	476.41
MARGARET MARSIGLIA and NICHOLAS MARSIGLIA	Damages	3,000.00
	Prejudgment Interest	847.80
	Costs	32.00
	Total	3,879.80

Appendix B

Final Decree on Mandate and Remand

ALMINA NAGEL, as Limited Administratrix of the Estate of ALLEN FRANCIS EDGAR, Deceased	Damages	1,000.00
	Prejudgment Interest	282.60
	Costs	40.50
	Total	1,323.10
MARGARET V. NALLY and CHRISTOPHER NALLY	Damages	400.00
	Prejudgment Interest	113.04
	Costs	31.95
	Total	544.99
ROBERT PIPER	Damages	900.00
	Prejudgment Interest	254.34
	Costs	21.00
	Total	1,175.34
TEXACO INC.	Damages	6,604.60
	Prejudgment Interest	1,866.44
	Costs	201.99
	Total	8,673.03
MYRON VARNUM	Damages	18,000.00
	Prejudgment Interest	4,379.80
	Costs	93.00
	Total	22,472.80

Appendix B

Final Decree on Mandate and Remand

and it is

ORDERED, ADJUDGED AND DECREED, that the Special Commissioner, Joseph E. Ruggiero, be paid by the petitioner of The City of New York the sum of $3,500.00 for his services and $895.40 for his disbursements herein, with interest from the date of the aforesaid final decree; and it is

ORDERED, ADJUDGED AND DECREED, that in addition to its costs as claimant herein, Texaco Inc. be paid by the petitioner, The City of New York, $2,477.67 the costs taxed in Texaco's favor in the litigations over the above collision, including statutory interest thereon accrued to date, all with interest from the date of this decree; and it is

ORDERED, ADJUDGED AND DECREED, that the defaults of all persons, companies or corporations who may have sustained damage, loss, injury or destruction as a result of the aforesaid collision on January 5, 1959, in Upper New York Bay, between the ferryboat TOMPKINSVILLE of the petitioner The City of New York and the barge TEXACO 396 in tow of the tug ALL AMERICAN, be and the same are hereby noted, and all such claims and any and all others having claims for damages, loss, injury or destruction that may have been caused by or resulted from said collision be and the same hereby are forever barred, restrained and enjoined from filing claims or instituting suit against the petitioner, and petitioner The City of New York and the ferryboat TOMPKINSVILLE are hereby relieved of all further liability in respect of such unfiled claims; and it is further

Appendix B

Final Decree on Mandate and Remand

ORDERED, ADJUDGED AND DECREED, that upon payment of the awards to the claimants listed herein, together with interest and costs as hereinabove provided, the petitioner The City of New York and the ferryboat TOMPKINSVILLE shall be forever released and discharged of all further liability for loss, damage, injury or destruction occasioned by or resulting from the aforesaid collision; and it is further

ORDERED, ADJUDGED AND DECREED, that unless the payments prescribed by this decree be made or an appeal be taken within thirty days after service hereof with notice of entry, the claimants and Special Commissioner may have execution against the petitioner The City of New York and the ferryboat TOMPKINSVILLE to recover the sums herein awarded and decreed, together with their reasonable costs and attorneys' fees incurred in obtaining such recovery, except that if the petitioner, The City of New York timely files a petition for certiorari, or files notice of appeal from this decree insofar as it awards prejudgment interest to the personal injury claimants, then execution shall be stayed on the amounts above awarded the personal injury claimants as prejudgment interest and the amounts due as statutory interest thereon from September 21, 1963 forward, such stay to be continued pending further order or decree of this Court; and it is further

ORDERED, ADJUDGED AND DECREED, that upon entry of this decree all bonds and stipulations heretofore filed herein by

the claimants be and the same hereby are cancelled and discharged of record.

EDMUND L. PALMIERI
United States District Judge

Dated: New York, New York
August 17, 1964.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 3 1964
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1964

No. 468

IN THE MATTER OF THE PETITION OF
THE CITY OF NEW YORK,
Petitioner,

As owner of the Ferryboat TOMPKINSVILLE for a limitation of or exoneration from liability,

ROSE BERNSTEIN, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

KANE, GRAE & AGAR, Esqs.,
Proctors for Respondents,
350 St. Marks Place,
Staten Island 1, New York.

SOLOMON R. AGAR, Esq.,
Counsel for Respondents.

INDEX

	PAGE
Brief in Opposition to Petition for Certiorari	1
Extract From Opinion Below	1
The Question Presented	3
Request for Denial of Writ of Certiorari	8
Appendix by Respondent	9

Authorities Cited

Cases:

Moore-McCormack Lines, Inc. v. Amirault, 202 F. 2d 893 C. A. 1	6
Moore-McCormack Lines, Inc. v. Richardson, 295 F. 2d 583 (2d Cir.), cert. denied, 368 U. S. 989 (1962)	3, 5
Stickel v. United States, 76 S. Ct. 1067	7
The Baltimore, 75 U. S. 377	3
The Manhattan, 85 F. 2d 427 (3 Cir. 1936), cert. denied, *sub nom.* United States v. Bessner, 300 U. S. 654 (1936)	3
The Scotland, 118 U. S. 507	3, 5, 6

Other Authorities

Benedict on Admiralty, 6th Ed., Vol. 3, p. 191	5
Corpus Juris Secundum, Admiralty, Vol. 2, Sec. 205 b, p. 358	5
Norris, The Law of Seaman, Sec. 695, p. 387	5

Rules and Statutes:

Revised Rules of the Supreme Court, Rule 56 (3)	7

Supreme Court of the United States

OCTOBER TERM, 1964

No. 468

In the Matter of the Petition of

THE CITY OF NEW YORK,

Petitioner,

As Owner of the Ferryboat TOMPKINSVILLE for a limitation of or exoneration from liability, ROSE BERNSTEIN, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The respondents submit this brief in opposition to the petition for a writ of certiorari.

The petitioner presents the question as to whether an Admiralty Court has discretionary power to allow prejudgment interest on a personal injury claim. The Court of Appeals remanded the case to the District Court to determine the amount of the prejudgment interest, consistent with the following material part of the Court's opinion (Resp. Ap. A. 12, 13):

> "In this case 17 claimants suffered physical injury. Elements of these claims included the cost of medical care, X-rays, medication, and pain and suffering as well as the pecuniary loss attributable to absence from employment. We see little reason for distingush-

ing between the loss resulting from medical expenses, pain and suffering, and diminution of earning power in the action involving a wrongful death and the case where, as here, the plaintiffs' injuries though not fatal nonetheless warrant the awarding of damages. In both the *Moore-McCormack* v. *Richardson* (295 F. 2d 583, cert. denied 368 U. S. 989) case and in the instant case the plaintiffs suffered a loss at a time long prior to the determination of the dollar measure of the loss. The defendant's liability arises at the time of the injury to the plaintiff and the later award by the court merely fixes the amount of a loss suffered at a prior time.

The broad application of *restitutio in integrum* enables a more equitable measure of the loss to the injured party—particularly in light of the progressively long delays in disposing of much of the litigation which must wait its turn on crowded court calendars. Moreover, the award of prejudgment interest discourages sham contentions and an improper use of the law's delays and thereby assists an earlier settlement between the parties.

Certainly the granting of prejudgment interest is not appropriate when the determination of damages itself includes some compensation for the delay from the time of injury to the time of judgment. All the claimants presented evidence before the Commissioner who determined the damages to each. These awards varied between $150 and $18,000. Yet nowhere in the report of the Commissioner is there any indication whether the damages allowed reflect the delay in assessing damages. In addition the report of the Commissioner does not reveal whether any of the damages allowed here represent compensation for future loss of earnings or future pain and suffering. To the extent that there are elements of future losses which are represented in the final damages prejudgment in-

terest is, of course, not appropriate. We therefore remand the case to the district court to determine consistent with this opinion what is the proper portion of the damages awarded for each claim on which the prejudgment interest should run."

As to the Question Presented

This rule as to prejudgment interest in Admiralty cases has been consistently followed in *The Scotland*, 118 U. S. 507; *The Baltimore*, 75 U. S. 377; *The Manhattan*, 85 F. 2d 427 (3 Cir. 1936), cert. denied, *sub nom. United States* v. *Bessemer*; 300 U. S. 654 (1936); *Moore-McCormack Lines, Inc.* v. *Richardson*, 295 F. 2d 583, cert. denied 368 U. S. 989 (1962).

In the instant case, the Court of Appeals said in reference to the *Moore-McCormack* case, *supra* (Pet. Ap. A. 11):

> "'when a court fixes damages to compensate for a loss which occurred in the past, there should be some allowance for the period between the date of the loss and the date of judgment. Recompense may thus be given for the further loss in the postponement of the receipt of compensation. In all too many instances the delay in reaching cases for trial brings suffering and privation to those who were dependent on the deceased. Even the more fortunate of the bereaved may have been forced to borrow money at interest to meet their expenses . . . [T]he defendants who are ultimately directed to pay have had the use of the money declared to be due . . .' *Supra* at 594. It is the combination of these two elements, the immediate loss to the plaintiff and the delay in the payment of compensation by the defendant that warrants the granting of prejudgment interest as a proper element of damages in fixing

the loss to the dependents of decedent who bring suit in a court of admiralty."

"The petitioner has strenuously litigated each and every facet of this case" over a period of five years (Resp. Ap.—Palmieri, D. J.). The authority of the District Judge to exercise his discretion in awarding prejudgment interest was conceded in proceedings before District Judge.

The District Judge stated in a memorandum attached to the Final Decree herein that "the award (of prejudgment interest) in this case is justified in my opinion in view of the long delay in affording relief and which has been largely the result of the manner in which this litigation has been conducted" (Resp. Ap. A. 1).

There is no abuse of discretion here. No conflict exists. The law is clear and this question does not merit this Court's attention.

The District Court granted prejudgment interest on the damage awards as a matter of discretion because of the "long delay" and the manner in which the litigation has been conducted by the Petitioner, City of New York. Judge Palmieri in his memorandum attached to the Final Decree stated (Resp. Ap. A. 1):

> "The interlocutory decree was entered on September 6, 1961. The petitioner has strenuously litigated each and every facet of this case. The award of interest is concededly a matter of discretion. The award in this case is justified in my opinion in view of the long delay in affording relief which has been largely the result of the manner in which this litigation has been conducted."

The Court of Appeals allowed prejudgment interest for the claimants' damages suffered at the time of the loss and remanded the case to the District Court to review the judgment and to disallow any interest on any damages or com-

pensation for "future loss of earnngs or future pain and suffering" (Pet. Ap. A. 13). The opinion of the Court of Appeals states (Pet. Ap. A. 13):

> "• • • To the extent that there are elements of future losses which are represented in the final damages prejudgment interest is, of course, not appropriate. We therefore remand the case to the district court to determine consistent with this opinion what is the proper portion of the damages awarded for each claim on which the prejudgment interest should run."

Although the Court did not expressly say so, it is clear that it was doing no more than exercising the discretion, which all courts have in admiralty, to allow interest in whole or in part, or disallow it altogether, as seems fair under the circumstances of each case. This is settled law. In *The Scotland*, 118 U. S. 507, this Court said:

> "The allowance of interest on damages is not an absolute right. Whether it ought or not to be allowed depends upon the circumstances of each case, and rests very much in the discretion of the tribunal which has to pass upon the subject, whether it be a court or jury." (pp. 518-519)

To the same effect see Benedict on Admiralty, 6th Ed., Vol. 3, p. 191; Corpus Juris Secundum, Admiralty, Vol. 2, Sec. 205b, p. 358; Norris, The Law of Seamen, Sec. 695, p. 387.

The petitioner's contention that an Admiralty Court lacks power to award prejudgment interest in a personal injury claim was rejected by the Court of Appeals. The Appellate Court relied on its opinion in *McCormack Lines, Inc.* v. *Richardson*, 295 F. 2d 583, cert. denied, 368 U. S. 989 (1962), in which it stated at 295 F. 2d 592, 593:

> "If it was the intention of Congress to bar recovery of moratory interest on 'unliquidated' death claims,

> we are of course bound. But the hoary distinction between 'liquidated' and 'unliquidated' claims, criticized by eminent authority well before the enactment in 1920 of the Death on the High Seas Act, has never become so firmly entrenched in admiralty as it has been at law. The trend in admiralty prior to enactment of the statute had been toward allowance of prejudgment interest on claims for negligent or wrongful death. The Death on the High Seas Act merely instructs that 'the recovery * * * shall be a fair and just compensation for the pecuniary loss sustained.' 46 U.S.C.A. Sec. 762. We see nothing in this language to indicate that the Congress did not intend that the damages should give full compensation for all pecuniary loss sustained including that resulting from delay in being compensated. See 36 A.L.R. 2d 337, 345 (1954)."

Petitioner's contention that the decision of the Court below in the instant cases is directly in conflict with cases in the 6th and 9th Circuit refer to cases decided in 1919 and prior thereto which cases are in conflict with this Court's decision in *The Scotland*, 118 U. S. 507, *supra*.

The only comparatively recent case cited by petitioner, in support of its contention, is *Moore-McCormack* v. *Amirault*, 202 F. 2d 893 (C. A. 1) (1953). Petitioner concedes that the relevant part of the opinion of the Court of Appeals is *dictum*. The Court held that Federal Courts sitting in Admiralty has discretion to allow prejudgment interest on some unliquidated claims but went on to state that it was at least doubtful whether an Admiralty Court has discretion to allow such interest on personal injury claims. The Court stated: "We mention the problems discussed in the preceding four paragraphs merely to make clear that we reserve judgment upon them, *since the present case, as it comes to us does not require their determination*" (202 F. 2d 898, italics inserted). *Dictum* in an

opinion may not be submitted by petitioner in support of a contention that there is a conflict in the decisions of the Court of Appeals in different circuits. In *Stickel* v. *United States* (1956), 76 S. Ct. 1067, this Court said (1068): "What next follows in the opinion as to the so-called Second Circuit Doctrine is plainly dictum presenting nothing reviewable."

The Revised Rules of the Supreme Court permit interest if specifically directed by the Court, viz.:

> "Rule 56 (3) In cases in Admiralty, damages and interest may be allowed only if specifically directed by the Court."

This Rule makes no distinction as to damages to the hull of claimant's vessel, or as to damages for the death of the claimant's decedent on the high seas, or damage to a claimant such as respondent, Myron Varnum, who suffered a permanent severance of a section of his trigeminal nerve.

The decision of the Admiralty Court in the instant case not only specifically directed the allowance of interest, but the District Judge set forth his reason therefor; viz.: "The petitioner has strenuously litigated each and every facet of this case. The award of interest is concededly a matter of discretion. The award in this case is justified in my opinion in view of the long delay in affording relief and which has been largely the result of the manner in which this litigation has been conducted." (Memorandum attached to Final Decree. Resp. Ap. A. 1.)

This exercise of discretion was approved in the opinion of the Court of Appeals in the instant case, viz.: "The broad application of *restitutio in integrum* enables a more equitable measure of the loss to the injured party—particularly in light of the progressively long delays in disposing of much of the litigation which must wait its turn on crowded court calendars. Moreover, the award of pre-

judgment interest discourages sham contentions and an improper use of the law's delays and thereby assists an earlier settlement between the parties" (Pet. Ap. A. 12).

The question of the exercise of discretion by the Admiralty Court, in granting interest herein, is confined solely to this case. There is no question presented by the Petition for a Writ herein which is of general public interest. The decision below does not conflict with principles established by this Court. On the contrary, the allowance of damages with prejudgment interest has been established both by the Revised Rules of the Supreme Court (R. 56(3)) and by decisions of this Court.

The Court of Appeals' determination of the question of prejudgment interest was clearly correct. This point involves a question of District Judges' exercise of discretion and no question of law nor any question of general interest and does not merit the attention of this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

Solomon R. Agar, Esq.,
Counsel for Respondents.

Dated: Staten Island, New York, September 29th, 1964.

RESPONDENT'S APPENDIX I

Memorandum Endorsed and Attached to Final Decree.

September 20, 1963

As an additional allowance of costs in this case, and since they are innocent of any fault, the personal injury claimants are allowed as part of their costs here, the costs awarded against them in the companion limitations suit of Texaco, Inc.

John F. Woods, one of the personal injury claimants, is not included in this decree because settlement has been agreed upon. But since payment has not yet been made to him, this decree will be deemed without prejudice to his rights until such time as payment is effected.

The interest calculations set forth in the decree been made through September 17, 1963. Interest from that day forward can be calculated on the total of damages, interest and costs. The City of New York now claims for the first time that interest should be at the rate of 3% under Section 3-a of the New York General Municipal Law and that it should run from the date of the final decree, not from the date of damage. The interlocutory decree was entered on September 6, 1961. The petitioner has strenuously litigated each and every facet of this case. The award of interest is concededly a matter of discretion. The award in this case is justified in my opinion in view of the long delay in affording relief and which has been largely the result of the manner in which this litigation has been conducted.

The attached decree is deemed amended as hereinabove stated.

Sgd. EDMUND L. PALMIERI
Edmund L. Palmieri
U. S. D. J.